

1 Shauna R. Miller, Bar No. 015197  
2 State Bar of Arizona  
3 111 West Monroe, Suite 1800  
4 Phoenix, Arizona 85003-1742  
5 Telephone (602) 340-7278  
6 Senior Bar Counsel

7 Mark I. Harrison, Bar No. 001226  
8 *Bryan Cave LLP*  
9 Two North Central Avenue, Suite 2200  
10 Phoenix, AZ 85004-4406  
11 Telephone (602) 364-7405  
12 Respondent's counsel

13 **BEFORE THE DISCIPLINARY COMMISSION**  
14 **OF THE SUPREME COURT OF ARIZONA**

15 **IN THE MATTER OF A MEMBER**  
16 **OF THE STATE BAR OF ARIZONA**

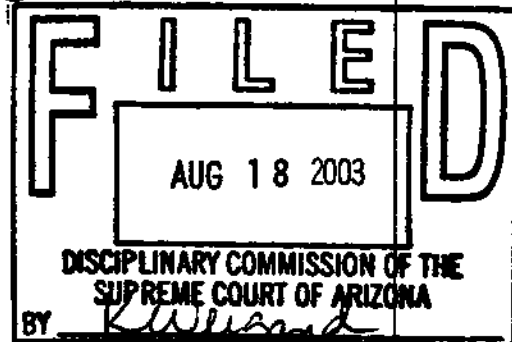
17 **ROBERT J. TRAICA**  
18 **Bar No. 006505,**

19 Respondent.

File No. 01-1392

**TENDER OF ADMISSIONS AND**  
**AGREEMENT FOR DISCIPLINE**  
**BY CONSENT**

20 This agreement is entered into between the State Bar of Arizona and  
21 respondent Robert J. Traica, who is represented by Mark I. Harrison, and is  
22 submitted pursuant to Rule 56(a), Ariz.R.S.Ct. and the guidelines for discipline by  
23 consent issued by the Disciplinary Commission of the Supreme Court of Arizona.  
24 Respondent's admissions to the charges are being tendered in exchange for the  
25 form of discipline stated herein, subject to review and acceptance by the  
Disciplinary Commission.



1 Respondent entered into an agreement to settle a lawsuit that included a  
2 broad release for any future claim for malpractice liability with unrepresented  
3 former clients without first advising the clients in writing to seek independent  
4 representation. Respondent will receive a censure for his conduct and has agreed  
5 that the memorandum of understanding in file no. 99-2054 will be extended to run  
6 concurrent with the memorandum of understanding in file no. 01-1391<sup>1</sup>.  
7

8  
9 This agreement serves the purposes of discipline in that it protects the  
10 public and will deter other lawyers from engaging in similar misconduct.  
11 Restitution is not applicable in this matter. Respondent shall pay all costs and  
12 expenses incurred in these discipline matters. The joint memorandum in support  
13 of the agreement by consent is filed contemporaneously herewith.  
14

### 15 FACTS

- 16 1. Respondent was admitted to practice law in Arizona on October 4, 1980.
- 17 2. A probable cause order was entered in this matter on June 10, 2002 (Exhibit  
18 A). A formal complaint has not been filed.
- 19 3. On or about June 28, 1993, Bruce and Wendy Shpillar ("the Shpillers") and  
20 Robert Berken ("Berken") formed a L.L.C. Foster & Earle, P.C. ("Foster &  
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22  
23  
24

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25 <sup>1</sup> Respondent Steven Feola

1 Earle") prepared the legal documents for the formation and operation of the  
2 business and Cocoa B's restaurant and bar opened in August 1993.

3  
4 4. Disputes arose between the Shpillers and Berken and in late 1993, the Shpillers  
5 retained Smith & Feola ("the firm") to represent them to prosecute claims  
6 against Berken.

7  
8 5. On December 10, 1993, the firm filed a complaint on behalf of the Shpillers  
9 against Berken. On April 29, 1994, Berken filed a personal Chapter 13  
10 bankruptcy petition staying the litigation.

11  
12 6. On April 10, 1996, the firm filed a legal malpractice claim against Foster &  
13 Earle and Robert Earle on behalf of the Shpillers. Also included as defendants  
14 were Michael Lynn and the Bank of America.

15  
16 7. Rose Marsac, a friend of the Shpillers, agreed to be jointly and severally  
17 responsible with the Shpillers for the payment of their attorney's fees, but she  
18 was not a client of the firm.

19  
20 8. A dispute arose in connection with the payment of legal fees and Respondent's  
21 firm withdrew from representing the Shpillers and filed a lawsuit against the  
22 Shpillers and Marsac for non-payment of attorney's fees.

23  
24 9. On July 23, 1998, the Shpillers, Marsac and Respondent's firm entered into a  
25 settlement agreement concerning the lawsuit brought by the firm to recover its  
attorney's fees.

1 10. Respondent contends he researched ER 1.8(h) prior to preparation of the  
2 settlement agreement and concluded it did not apply. For purposes of this  
3 agreement, the State Bar does not dispute this contention.  
4

5 11. Respondent prepared the settlement agreement entered into between the  
6 Shpillers and the firm.

7 12. Although the Shpillers were represented by independent counsel for purposes  
8 of the lawsuit against Foster & Earle, et al., Respondent did not confirm  
9 whether the Shpillers were receiving independent counsel specifically for  
10 purposes of the settlement agreement and they were not advised in writing to  
11 seek independent representation relating thereto before entering into the  
12 agreement and signing the release.  
13  
14

15 13. The settlement agreement contained a release that barred all future actions,  
16 including any malpractice action, arising from the firm's representation of the  
17 Shpillers.  
18

### 19 CONDITIONAL ADMISSIONS

20 Respondent conditionally admits that his conduct as described above  
21 violated Rule 42, Ariz.R.S.Ct., specifically, ER 1.8(h).  
22

### 23 SANCTION

24 Respondent and the State Bar agree that on the basis of the conditional  
25 admissions contained herein, the appropriate disciplinary sanction is as follows:

1 1. Respondent shall receive a censure for violating Rule 42 Ariz. R. S. Ct.,  
2 specifically ER 1.8(h)

3  
4 2. Respondent is currently participating in the State Bar's diversion program  
5 in an unrelated matter and the memorandum of understanding in that matter  
6 will be extended to run concurrent with the memorandum of understanding  
7 in file no. 01-1391<sup>2</sup>. This term is intended to ensure that the Respondent in  
8 this matter and the Respondent in File No. 01-1391 will work together to  
9 ensure appropriate supervision of lawyers and staff during the period of  
10 diversion specified in the Memorandum of Understanding in File No. 01-  
11 1391. However, even if the diversion in File No. 01-1391 is extended  
12 beyond its present term, the diversion in the present matter will terminate on  
13 June 17, 2005.  
14  
15

16 3. Respondent shall be assessed the costs and expenses incurred in these  
17 disciplinary matters, pursuant to Rule 52(a)(8), Ariz.R.S.Ct. A statement of  
18 costs and expenses is attached hereto (Exhibit B).  
19

20 Respondent, by entering into this agreement, waives his right to a formal  
21 disciplinary hearing that he would otherwise be entitled to pursuant to Rule  
22

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23  
24 <sup>2</sup> Respondent and Mr. Feola, the respondent in file no. 01-1391, are partners in the law firm of  
25 Smith, Feola & Traica (fka Smith & Feola). Mr. Feola entered into a memorandum of  
understanding with the State Bar to address supervision issues over the firm's associate  
attorneys. Respondent's current memorandum in file no. 99-2053 will run concurrently with  
Mr. Feola's memorandum in file no. 01-1391.


1 53(c)6, Ariz.R.S.Ct., and the right to testify or present witnesses on his behalf at a  
2 hearing. Respondent further waives all motions, defenses, objections, or requests  
3 which he has made or raised, or could assert hereafter, if the conditional  
4 admissions and stated form of discipline are approved. Respondent has the  
5 assistance of counsel in these proceedings. Respondent acknowledges that he has  
6 read this agreement and received a copy of it.  
7

8  
9 This tender of admissions and agreement for discipline by consent will be  
10 submitted to the Disciplinary Commission for approval. Respondent realizes that  
11 the Commission may request his presence at a hearing for presentation of  
12 evidence and/or oral argument in support of this agreement. He further recognizes  
13 that the Commission may recommend rejection of this agreement, and that the  
14 Arizona Supreme Court may accept or reject the Commission's recommendation.  
15 If the Arizona Supreme Court or the Disciplinary Commission rejects this  
16 agreement, Respondent's conditional admissions are withdrawn.  
17  
18

19 **This agreement, with conditional admissions, is submitted freely and**  
20 **voluntarily and not under coercion or intimidation. I am aware of the Rules**  
21 **of the Supreme Court with respect to discipline and reinstatement.**

22 DATED this 7<sup>th</sup> day of August, 2003.

23 SMITH, FEOLA & TRAICA, P.C.

24   
25 Robert J. Traica  
Respondent

1  
2 DATED this 11<sup>th</sup> day of August, 2003.

3 BRYAN CAVE LLP

4 

5 Mark I. Harrison  
6 Respondent's Counsel

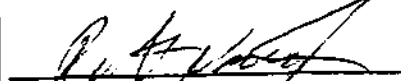
7 DATED this 15<sup>th</sup> day of August, 2003.

8 STATE BAR OF ARIZONA

9 

10 Shauna R. Miller  
11 Senior Bar Counsel

12  
13 Approved as to form and content:

14 

15 Robert Van Wyck  
16 Chief Bar Counsel

17  
18 Original filed this 18<sup>th</sup> day  
19 of August, 2003, with the  
20 Disciplinary Clerk's Office

21 Copy of the foregoing hand delivered  
22 this 18<sup>th</sup> day of August, 2003, to:

23 Dee Steadman  
24 Lawyer Regulation Records Manager  
25 111 West Monroe St., Suite 1800  
Phoenix, AZ 85003

1  
2 Copy of the foregoing mailed  
3 this 18<sup>th</sup> day of August, 2003, to:

4 Mark I. Harrison  
5 *Bryan Cave LLP*  
6 Two North Central Avenue, Suite 2200  
7 Phoenix, AZ 85004-4406  
8 Respondent's counsel

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11 by: *Barbara T. Chandler*  
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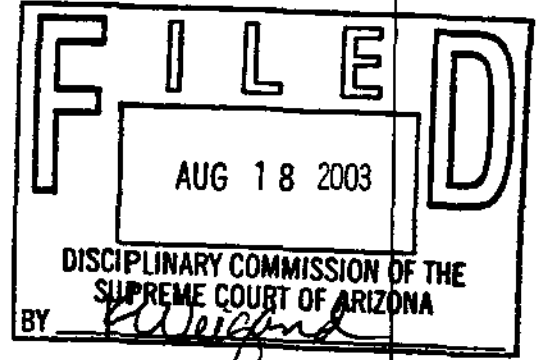
19 **Respondent.**

20 File No. 01-1392

21 **JOINT MEMORANDUM IN**  
22 **SUPPORT OF THE AGREEMENT**  
23 **FOR DISCIPLINE BY CONSENT**

24 The State Bar of Arizona and respondent Robert J. Traica, who is  
25 represented by Mark I. Harrison, hereby submit their Joint Memorandum in  
Support of the Agreement for Discipline by Consent.

Respondent entered into an agreement to settle a lawsuit that included a  
broad release for any future claim for malpractice liability with unrepresented  
former clients without first advising the former clients in writing to seek  
independent representation. Respondent will receive a censure for his conduct and



1 has agreed that the memorandum of understanding in file no. 99-2054 will be  
2 extended to run concurrent with the memorandum of understanding in file no. 01-  
3 1391<sup>1</sup>.  
4

5 This agreement serves the purposes of discipline in that it protects the  
6 public and will deter other lawyers from engaging in similar misconduct.  
7 Restitution is not applicable in this matter. Respondent shall pay all costs and  
8 expenses incurred in these discipline matters. The Tender of Admission and  
9 Agreement for Discipline by Consent is filed contemporaneously herewith.  
10

11 In arriving at the agreed upon sanctions, consideration was given to the ABA  
12 *Standards for Imposing Lawyer Sanctions* ("ABA Standards"), Rule 52(a)(11), Ariz.  
13 R. S. Ct., and case law.  
14

### 15 ABA STANDARDS

16 The ABA *Standards* are designed to promote consistency in the imposition of  
17 sanctions by identifying relevant factors that courts should consider and then  
18 applying these factors to situations where lawyers have engaged in various types of  
19 misconduct. ABA *Standard* 1.3, Commentary.  
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25 <sup>1</sup> Respondent Steven Feola

1 In this matter, consideration was given to ABA *Standard* 4.33. Censure is  
2 generally appropriate when a lawyer is negligent in determining whether there is a  
3 conflict of interest and causes injury or potential injury to a client.  
4

5 Here, respondent's firm had represented Mr. and Mrs. Shpiller in litigation.  
6 A friend of the clients', Rose Marsac, had agreed to be jointly and severally  
7 responsible for payment of the fees for the representation, but a dispute arose  
8 concerning payment of the fees. Respondent, on behalf of his firm, negotiated a  
9 settlement of the suit for fees with the clients and Ms. Marsac. Respondent  
10 mistakenly believed the clients were represented by independent counsel and did  
11 not advise the clients in writing to review with independent counsel the proposed  
12 settlement agreement, which contained a release barring future claims against  
13 respondent's firm. Respondent maintains that he researched ER 1.8(h) but  
14 concluded it did not apply.  
15  
16

17 In determining an appropriate sanction, both the Court and the Commission  
18 consider the duty violated, the lawyer's mental state, the actual or potential injury  
19 caused by the misconduct, and the existence of aggravating and mitigating factors.  
20  
21 *Matter of Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.  
22 Respondent was negligent in determining there was a conflict of interest in  
23 preparing a settlement document for former clients that contained a broad release,  
24 without advising the former clients in writing to obtain independent  
25

1 representation. There was client harm due to respondent's negligence as it  
2 prolonged and expanded the later malpractice action the former clients filed  
3 against respondent and his firm.  
4

5 In deciding what sanction to impose the following aggravating and  
6 mitigating circumstances should be considered.

7 In aggravation:

8 Standard 9.22(i) substantial experience in the practice of law. Respondent  
9 has been in practice for twenty three years in the State of Arizona.  
10

11 In mitigation:

12 Standard 9.32(e) full and free disclosure. Respondent cooperated with the  
13 State Bar during its investigation.  
14

### 15 PROPORTIONALITY ANALYSIS

16 Sanctions against lawyers must have internal consistency to maintain an  
17 effective and enforceable system; therefore, the court looks to cases that are  
18 factually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d  
19 1161, 1171, (1988).  
20

21 In *In re Preston*, 111 Ariz. 102, 523 P.2d 1303 (1974), Preston was  
22 censured for dictating a release and presenting it to his client for his signature after  
23 the client fired Preston and asked for his file back. The release exonerated and/or  
24 limited Preston's liability to the client. The client refused to sign the release and  
25

1 left without his file. The Court stated that it did not matter that Preston contended  
2 that he had not committed malpractice, that the "offending document" was a  
3 violation of DR6-102(A)<sup>2</sup>. Although this case deals with DR6-102(A), the notes  
4 to ER 1.8(h) state that ER 1.8(h) deals with the same subject as DR 6-102(A).  
5

6 In addition to *Preston*, there is an instructive 1999 Supreme Court of  
7 Kansas case involving similar facts. Kansas' Rules of Professional Conduct, ER  
8 1.8(h), is identical to Arizona's ER 1.8(h). In *In re Carson*, 268 Kan. 134, 991  
9 P.2d 896 (1999), Carson was retained to represent a client in post divorce child  
10 support matters. Carson filed a limited action in Wyandotte County to collect his  
11 fees when the client failed to pay him. The limited action was dismissed with  
12 prejudice when the parties signed a mutual release and satisfaction. Carson did  
13 not inform the client to consult independent counsel before signing the mutual  
14 release. Carson argued in his disciplinary hearing that he did not violate ER 1.8(h)  
15 because at the time the release was signed, the client had not asserted a claim for  
16 malpractice. The Kansas Supreme Court found that it did not matter that no actual  
17 claim existed at the time the release was filed. Respondent still had a duty to first  
18 advise the client in writing that independent representation was appropriate in  
19  
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25 <sup>2</sup> DR6-102(A) provides: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."

1 connection therewith. There were five aggravating factors and four mitigating  
2 factors. Carson received a censure.

3  
4 In this case, respondent entered into an agreement to settle a lawsuit that  
5 included a broad release for any future claim for malpractice liability with  
6 unrepresented former clients without first advising the clients in writing to seek  
7 independent representation.

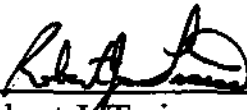
8  
9 Based on the aforementioned, the State Bar and respondent agree that  
10 respondent's conduct in this matter warrants a censure, continuation of his  
11 diversion contract, and the costs and expenses incurred in these disciplinary  
12 matters and respectfully request the imposition of same herein.

### 13 CONCLUSION

14  
15 Recognizing that it is the prerogative of the Disciplinary Commission to  
16 determine the appropriate sanction, it is nevertheless the belief of the State Bar  
17 and respondent that the objectives of discipline will be met by the imposition of a  
18 censure, the continuation of the prior diversion agreement, and the costs and  
19 expenses of these proceedings.

20  
21 DATED this 22 day of July, 2003.

22 SMITH, FEOLA & TRAICA, P.C.

23  
24   
25 Robert I. Traica  
Respondent

1 DATED this 24 day of July, 2003.

2 BRYAN CAVE LLP

3 

4 Mark I. Harrison  
5 Respondent's Counsel  
6

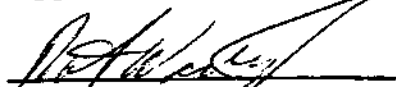
7 DATED this 15<sup>th</sup> day of August, 2003.

8 STATE BAR OF ARIZONA

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10 Shauna R. Miller  
11 Senior Bar Counsel  
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13 Approved as to form and content:

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15 Robert Van Wyck  
16 Chief Bar Counsel  
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by: Barton T. Chandler